

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

No. 74-1319

United States Court of Appeals FOR THE SECOND CIRCUIT

WESTINGHOUSE BROADCASTING COMPANY, INC., KYW-TV,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

DIRECTORS GUILD OF AMERICA, INC.,
Intervenor.

On Petition for Review and Cross-Applcation
for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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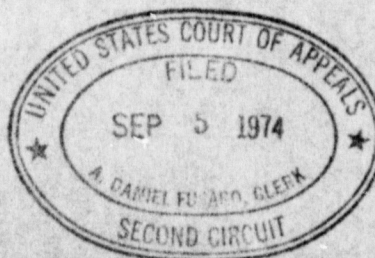
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On Petition for Review and Cross-Application
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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

COUNTER-STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the certified representative of its employees in an appropriate unit.

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon the petition of Westinghouse Broadcasting Company, Inc., KYW-TV, (hereinafter the "Company") pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for review of the Board's order (A. 39-41)¹ issued against the Company on March 19, 1974. The Board has cross-applied for enforcement of its order. The Board's decision and order (A. 32-41) are reported at 209 NLRB No. 121.² This Court has jurisdiction over the proceedings under Section 10(e) and (f) of the Act, the principal offices of the Company being in New York City. No jurisdictional issue is presented.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the duly certified representative of its employees in an appropriate unit (A. 37). In making this finding, the Board determined that, based upon the record in the underlying representation proceeding, staff producer-directors of the Company were employees within the meaning of the Act and constituted a unit appropriate for collective bargaining (A. 36, 4-7). The facts upon which the Board based its finding are summarized below.

¹ "A" references are to the Appendix. References preceding a semi-colon are to the Board's findings of fact; those following are to the supporting evidence.

² As the Board's order is based on findings made in a representation proceeding conducted under Section 9 of the Act, the record in that proceeding (Board Case No. 4-RC-10351) is part of the record before this Court pursuant to Section 9(d) of the Act.

A. The Representation Proceeding

On April 30, 1973, the Union³ filed a Petition for Certification of Representatives for a unit consisting of "(a)ll staff Producer-Directors" at the Company's KYW-TV station in Philadelphia, Pennsylvania (A. 3). The Company took the position that the staff producers-directors were supervisors within the meaning of Section 2(11) of the Act and not entitled to representation. In the alternative, the Company contended that the producer-directors were managerial employees. A hearing was held on June 5 and June 11, 1973, at which the following evidence relevant to the issues was adduced:

The Company owns and operates a number of broadcasting stations throughout the United States, including station KYW-TV in Philadelphia (A. 35, 4; 202, 205). The station is under the overall direction of a general manager, and is divided into five departments, one of which is the program department in which the producer-directors work (A. 4; 198-199). The program department is headed by a program manager. Under him are the assistant program manager and the production manager, both of whom supervise the producer-directors on a day to day basis (A. 4; 60-64, 134-135, 161, 227). The five producer-directors at KYW-TV engage in both the preparation of television program content (producing) and the technical aspects of broadcasting these programs (directing). They work primarily on news and public affairs programs and each is generally involved in more than one program. In news programming they act primarily in a directing capacity whereas they perform producing and directing functions when engaged in public affairs programs (A. 5; 132-133, 140).

³ Director's Guild of America, Inc.

Overall responsibility for a particular news program at KYW-TV is in the "news-editor" assigned to the program (A. 57, 176, 284-285). About 2 hours before a news program is scheduled to begin broadcasting, the news-editor distributes a program format to the producer-director and to each of the production unit employees assigned to the program (A. 5; 55). The program format is an outline of what material the program will include — the news stories, the order of presentation, and any films, slides or pictures, and accompanying audio material that the news-editor has decided to utilize on the program (*Ibid.*). About one half hour before the broadcast, the producer-director is supplied with a written script prepared by the news-editor, setting forth the final sequence of the broadcast in detail, including the spoken dialogue of the news talent. The script contains specific instructions and directions to the producer-director as to the use of audio-visual aids, and the timing and sequence of the program (A. 5; 55-56). The producer-director reviews the script to determine if any technical problems will arise (A. 5; 56, 104). If problems arise in the script or concerning the availability of the proper equipment and personnel the producer-director reports them to the news-editor (A. 5; 104-106).

During the actual news broadcasts the news-editor is in charge of the control room and supervises the producer-director and the audio man⁴ (A. 5; 57, 292). The producer-director's primary task during the broadcast is to operate a "switcher", a typewriter-like device by which he controls the quality of the picture and sound which is being transmitted from the station (A. 5; 56-57). For example, he may receive picture images from two cameras, on a nearby preview monitor, and he chooses the picture to be transmitted in accordance with the directions in the script by operating the switcher (A. 6; 56-57, 88, 288). As much as 85 percent of

⁴ The audio man operates an audio-switcher during the broadcast (A. 58).

the producer-director's time during a broadcast may be spent operating the switcher (A. 5; 98). In addition, the producer-director gives verbal directions to the production unit technicians, as to what type of picture, sound or film they should present. These directions are in keeping with specific instructions contained in the format or the script, or given by the news-director during the program (A. 5; 57, 118-123).⁵ Furthermore, these instructions are of an artistic nature and do not relate to the manner in which the instructions will be carried out or as to how the technicians should operate their equipment (A. 6; 124). In addition, the producer-director relays information from the news-editor to the stage manager, who in turn gives these instructions to the talent (A. 111-112). The producer-director may not vary from the script unless instructed to do so by the news-editor (A. 5; 57, 122, 161, 289-294). Only a news-editor can alter the script when the program is too long or too short (A. 5; 58, 289-294).

In public affairs programs, the producer-directors function is both a producing and a directing capacity (A. 5; 132-133, 167). Most public affairs projects are panel discussions with the talent acting as moderator; hence, little preparation is required for the shows beyond securing guests (A. 5; 146-148, 160, 165-166, 176, 185-186). Additionally most of the programs have no budget beyond the normal operating costs of broadcasting a program, such as salaries and overhead (A. 5; 330, 355, 97). As

⁵ One producer-director testified as follows:

"as far as telling a cameraman to pan left or pan right, [the producer-director's] got a certain set of criteria . . . passed on to him by his superiors; and if it doesn't conform to what it's supposed to be, then he throws it out or tells the guy that it's a bad shot . . . when you tell a cameraman to pan left or pan right; its indicated on the script, it's indicated on the format; it's indicated in talks with the program manager and the assistant program manager has with the producer-directors. Most of the guys have been told . . . after we do a show, we want the show done like this — more quick cuts, more zooms, more pans; you know they'll tell you what they want you to do; you've got these criteria to judge by and then you use them in telling a camera man what to do." (A. 128-129).

in the case of news programs, the producer-director on public affairs programs is not involved in the selection of the talent or of the production unit personnel with whom he works (A. 5; 84, 96, 147, 167).

In public affairs programs, the tasks of the producer-directors vary depending on the particular program involved. One of the programs is a new weekly children's program called "Big Kid, Little Kid." Participating in the program on a regular basis are several area educational institutions, for example, the Philadelphia Zoo, the Franklin Institute, the Academy of Natural Sciences (A. 87-89). These institutions usually choose and supply animals and technical materials for use on weekly shows (A. 86, 87, 88). The 5 or 6 children on each show are selected and contacted by the assistant program manager's secretary (A. 86). The script for the show is prepared by the talent after consultation with the assistant program manager's secretary and the producer-director (A. 86). The producer-director has never sought to override the opinions of the other two employees (A. 5; 92-93). The producer-director for that program, Richard Pyle, did suggest some changes in the format of the program, and some of the changes were accepted by his superiors (A. 5; 88-89, 229-231).

Another producer-director, James Schmidt, spends most of his time preparing for a program called Seven Days, by editing film according to a script prepared by the host-producer (A. 5; 132-133). A film editor works with the producer-director in editing the film and it is the film editor, over whom the producer-director has no authority, who actually cuts and splices the film (A. 5; 133-134). The host-producer is occupied most of the week in the "field" shooting the raw film footage for the program (A. 5; 132-133, 140, 152-153, 154). When the producer-director and the film-editor receive the raw film footage from the host-producer it has already been "scripted" by the host-producer "and basically the whole thing is complete" (A. 154). Hence, judgments made by the

producer-director with respect to editing the film are routine in nature. The producer-director is limited to making alterations in event of over-exposed or otherwise technically faulty film such as where the host has fumbled a word or has run out of film (A. 154-157).⁶

Another producer-director, James Herring, in addition to his other news and public affairs program duties, acts as a technical director for a public affairs program prepared entirely by the Education Technology Department of Hunter College. The producer-director thus has no control over the content of the program. Rather he acts solely as a liaison between the station and the show's producer, an employee of Hunter College, to insure the supply of the technical equipment needed to produce shows (A. 175, 181, 184).

Another producer-director, John Smith, directs two news programs and also is the producer-director for a one half-hour public affairs religious program which has a host (A. 160, 162). This producer-director had nothing to do with determining the budget or format for the program, which was given to him "as a package" (A. 165).

Most producer-directors are paid between \$10,500 and \$12,000 (A. 6; 69, 70, 71). Most of the technicians in the production unit are paid about \$16,000 (A. 6; 307). No producer-director has the authority to hire, fire, grant wage increases or time off, adjust grievances, or in any other way affect the working conditions of the Company's production unit technicians (A. 6; 67-68, 135-140, 161, 179-181). The production manager, not the producer-director, assigns technicians to particular jobs (A. 6; 61, 135). The producer-directors do not believe they have the authority to

⁶ With the exception of a single one half hour documentary, *Seven Days* was the only program that this producer-director worked on during the last several months (A. 149-150). On that particular program, there was little preparation, the producer-director consulted with others as to the guest panel to be used, and during the program he operated the switcher (A. 146-149).

change a technician's job assignment, and have never done so (A. 6; 72, 75, 139, 164-165, 96). A producer-director may bar a technician from the studio in an emergency, such as when the technician arrives drunk (A. 6; 333-334). Under normal circumstances, the producer-directors must get the approval of their supervisor to have technicians work overtime (A. 6; 299, 164, 179).⁷ No technician has ever been disciplined or discharged solely on the basis of a producer-director's recommendation (A. 346). Only one of the four producer-directors who testified at the hearing said he made reports about the performance of technicians (A. 6; 124, 151, 165, 179). However, his requests that a particular camera man not be assigned to his program were not granted by his supervisors (A. 6; 68).

Upon consideration of these facts, the Regional Director on July 23, 1973, issued his Decision and Direction of Election finding all staff producers to be employees within the meaning of the Act, and not supervisors or managerial employees (A. 4-8). He found a unit of all staff producer-directors to be appropriate and directed an election (A. 8). Upon the Company's Request for Review of the Regional Director's decision, the Board found that it raised no substantial issues warranting review "except as to the unit placement of Susan Horowitz," the producer-director of the Marsha Rose Show, who, assertedly has authority to "implement the [program's] budget" and to hire the staff for the program (A. 325, 349-350). The Board stated that Horowitz's inclusion "can best be resolved through the challenge procedure," and amended the Decision to permit her to vote subject to challenge (A. 21).

Thereafter on August 22, an election was conducted which was won by the Union by a vote of 4 to 0 (A. 34; 22). There were no objections

⁷ In the unusual circumstance where the station's program is running late because of some special program or event the producer-director informs technicians they may have to work overtime (A. 297, 223-224).

to the election or challenges (A. 22). Thereafter, on August 30, 1973, the Union was certified (A. 34; 23).

B. The Unfair Labor Practice Proceeding

Since about September 7, 1973, the Company has refused to bargain with the union, although the Union has requested it to do so (A. 37, 26). The General Counsel issued a complaint against the Company alleging that it refused to bargain in violation of Section 8(a)(5) and (1) of the Act, and, subsequently, in accordance with the Board's Rules and Regulations, moved for summary judgment by the Board on the complaint (A. 33; 25-28). The Company filed an "Opposition to Motion for Summary Judgment" attacking the determination as to the status of producer-directors in the underlying representation proceeding.

C. The Board's Decision and Order

The Board found that all the issues raised by the Company in the unfair labor practice proceeding were or could have been litigated in the prior representation proceeding, and, accordingly, the Board granted the General Counsel's motion for summary judgment (A. 34-35). Thus the Board concluded that the Company refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act. The Board's order requires the Company to cease and desist from its unfair labor practices and to bargain collectively with the Union in the bargaining unit in which the Union had been certified (A. 37).⁸

⁸ As the Company notes in its brief, after the Company filed its petition for review in this case and the Board filed cross-application for enforcement, the Company moved the Court to remand this case to the Board on the basis of the Court decision in *K.F.C. National Management Corp. v. N.L.R.B.*, ___ F.2d ___, 86 LRRM 2271 (1974). On June 18, 1974, after oral argument, the Court denied the Company's motion.

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY REFUSED TO BARGAIN WITH THE UNION IN VIOLATION OF SECTION 8(a)(5) AND (1) OF THE ACT

The Company has admittedly refused to bargain with the Union in this case solely because it contends that the staff producer-directors are not employees entitled to representation under the Act, but instead are either supervisors or managerial employees. Accordingly, the Company has violated Section 8(a)(5) and (1) of the Act if, as we show below, the Board properly rejected both these contentions.

A. The Board Properly Found that the Producer-Directors Were not Supervisors

1. Introduction

Section 2(11) of the Act reads as follows:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The interpretation of this statutory term calls into play the Board's "special function of applying the general provisions of the Act to the complexities of industrial life." *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1968). Accordingly, as this Court recently stated in *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 1001 (C.A. 2, 1973), with reference to the Board's discretion in evaluating supervisory status, "the

Board's findings in this area are entitled to special weight since, it possesses expertise "in evaluating actual power distributions which exist within an enterprise'" citing *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1172 (C.A. 2, 1968). Accord: *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870 (C.A. 2, 1970), cert. den., 402 U.S. 907.

While it is settled that Section 2(11)'s list of supervisory powers is to be read in the disjunctive, the section also "states the requirements of independence of judgment in the conjunctive (*i.e., in connection*) with what goes before." (Emphasis in original.) *Poultry Enterprises, Inc. v. N.L.R.B.*, 216 F.2d 798, 802 (C.A. 5, 1954). See also, *Rea Trucking Co. v. N.L.R.B.*, 439 F.2d 1065, 1066 (C.A. 9, 1971); *N.L.R.B. v. Magnesium Casting Co.*, 427 F.2d 114, 117 (C.A. 1, 1970), affirmed, 401 U.S. 137 (1971); *N.L.R.B. v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (C.A. 4, 1958), cert. den., 359 U.S. 911 (1959). Nor is it enough that an individual occasionally performs one of the functions listed in Section 2(11); he must consistently display true independence of judgment in implementing this authority. The exercise of some supervisory tasks in a merely "routine" "clerical," "perfunctory," or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. *Precision Fabricators, Inc. v. N.L.R.B.*, 204 F.2d 567, 569 (C.A. 2, 1953); *N.L.R.B. v. Swift & Co.*, 240 F.2d 65 (C.A. 9, 1957); *Dubin-Haskell Lining Corp. v. N.L.R.B.*, 375 F.2d 568, 570 (C.A. 4, 1967), cert. denied, 393 U.S. 824; *N.L.R.B. v. City Yellow Cab Co.*, 344 F.2d 575, 579-582 (C.A. 6, 1965).

Indeed, the Senate Committee Report accompanying Section 2(11) makes explicit Congress' intention that the Act's protections extend to employees exercising minor, sporadic or routine supervisory powers because certain employees with minor supervisory duties have problems which may justify the protection of the Act. It has therefore distinguished between straw bosses, lead men, and set-up men, on the one hand, and the

supervisor vested with such genuine management prerogatives as the right to hire, or fire, discipline, or make effective recommendations, with respect to such action. S. Rep. No. 105 on S.1126, 80th Cong., 1st Sess., p. 4: *Precision Fabricators, Inc.*, 204 F.2d 567, 569 (C.A. 2, 1953); *International Union of Brewery Workers v. N.L.R.B.*, 298 F.2d 297, 302-303 (C.A.D.C., 1961), cert. denied, 369 U.S. 843. We now show that tested by these principles, the Board's finding that the producer-directors are employees and not supervisors is clearly proper.

2. The producer-directors at Station KYW-TV do not have authority "responsibly to direct" other employees within the meaning of Section 2(11)

The Board's rejection of the Company's principal contention (Br. 18-23) that the producer-directors have authority "responsibly to direct" the production unit technicians with whom they work is well within the range of discretion entrusted to the Board and is supported by the record. As shown in the Counterstatement, the producer-directors' directorial task is to monitor the transmission over the air of a given broadcast, the content of which is determined by scripts prepared by the news-editor for news broadcasts and by the talent in public affairs broadcasts.⁹ The producer-director exercises final artistic control over the images transmitted over the air by his own operation of the switcher and by verbal instructions to cameramen and other technicians. The verbal instructions, of course, follow the dictates of the script, which at the very least, sets out the content, timing, and sequence of the show. This verbal communication, however, is ancillary to the producer-director's main directorial task of

⁹ In news programs, the script prepared by the news-editor is not even seen by the producer-director until a half hour before broadcast time. The producer-director may not deviate from the script unless instructed to do so by the news-editor, who is present in the news room during the broadcast, *supra*, pp. 4-5.

superintending the switcher and monitor. Indeed, one producer-director estimated that he spent 85 percent of his work time operating the switcher, (*supra*, p. 45). See, *N.L.R.B. v. Cousins Associates, Inc.*, 283 F.2d 242, 243 (C.A. 2, 1960); *Food Store Employees' Union No. 347, A.M.C. & B.W. v. N.L.R.B.*, 422 F.2d 685, 690 (C.A.D.C., 1969).

Hence, the producer-directors' instructions to the technicians are of an artistic or routine nature. The producer-directors routinely instruct skilled technicians earning several thousand dollars a year more than themselves by describing a desired effect which the technicians, each supplied with a format, already anticipate and independently are capable of achieving (A. 55). Given the fact that almost every employee gives orders to other employees at one time or another, the limited scope of the producer-directors' control over the production unit technicians supports the Board's finding that the producer-directors do not responsibly direct other employees. *Food Store Employees' Union No. 347, A.M.C. & B.W. v. N.L.R.B.*, *supra*, 422 F.2d at 690; *N.L.R.B. v. Security Guard Services*, 384 F.2d 143, 150-151 (C.A. 5, 1967).

Furthermore, as the Board found (A. 19) the producer-directors' instructions "do not relate to the actual operation of the equipment or the manner in which the operations are carried out. [The producer-directors] exercise no control over how the technicians carry out their . . . instructions". In this regard, one producer-director testified that producer-directors are "not responsible for the performance of the technicians on their shows * * * [that's a matter] of their own individual ability, their own individual training" (A. 100). The Company has made no contrary showing that producer-directors are responsible for the performance of technicians.

Since the producer-directors are not answerable for any inadequacy in the performance of the technicians with whom they are in verbal communication during a broadcast, producer-directors cannot be said to have

authority "responsibly to direct" as that phrase has been interpreted by the Board and the Courts. In the words of the Sixth Circuit, "to be responsible is to be answerable for the discharge of a duty or obligation." *Ohio Power v. N.L.R.B.*, 176 F.2d 385, 387 (C.A. 6, 1960), cert. den., 338 U.S. 899. Accord: *N.L.R.B. v. Fullerton Publishing Co. d/b/a Daily News Tribune*, 283 F.2d 545, 549 (C.A. 9, 1960); *Post-Newsweek Stations*, 203 NLRB No. 91, slip op. at p.5, 83 LRRM 1081 (1973); *National Broadcasting Co.*, 160 NLRB 1440, 1441-1442 (1966). Moreover, the Ninth Circuit elaborating on *Ohio Power* explained in *N.L.R.B. v. Fullerton*, *supra*, 283 F.2d at 549 that responsible direction means being responsible for the performance of others:

In our view, if a newspaper editor is given power or authority to direct or assign his reporter subordinates in the performance of their reportorial duties, and in turn is held answerable for the performance of his reporters in the extent and scope of coverage of news that he puts in his section of the paper, such direction is responsible direction and the editor is a supervisor. On the other hand, whenever the direction exercised has merely been that of relaying general orders to specific individuals, courts have held that the activity involved has not been sufficient to constitute responsible direction.

The Company's assertion (Br. 19-20) that the producer-directors alone are answerable for the quality of the television program when it goes out mistakenly confuses the producer-directors job as the last link on the chain before the transmission of the program with the test of answerability for the performance of supposed underlings. To be sure, the program manager may consult with a producer-director as to why a program "looked bad" but the record makes clear that he does so only because the producer-director sees not only the picture actually transmitted to the viewing audience but also the pictures transmitted from the various cameramen and therefore

"nobody would probably know better than [the producer-director] why something went wrong if it did" (A. 124, 291, 56, 57, 97-98, 288).¹⁰ Therefore, while producer-directors occupy a key position, the record is clear that they are not held responsible or accountable for the work of the cameramen and other technicians. Accordingly, for the reasons stated above, we submit that the Board properly concluded that the producer-directors did not responsibly direct the productive unit technicians.

**3. The producer-directors do not otherwise exercise
supervisory authority under Section 2(11)**

The Company concedes that the producer-directors are without authority to discharge, lay off, reward, or promote other employees (Br. 15). Moreover, the Company apparently conceded that producer-directors lack authority to adjust grievances, for it has not referred in its brief to any grievance-adjustment authority. As for the remaining indicia of supervisory authority ascribed to the producer-directors by the Company such as the authority to discipline, assign, suspend, hire or recommend such action, the record evidence supports the Board's conclusion that such authority is either theoretical in nature or exercised in a routine or sporadic manner.¹¹

¹⁰ In this connection, Program Manager Salzman testified, "Now all of these decisions that are made by the news department as to what stories may be included in the format are ultimately under the control and supervision of the producer-director who is calling the shots; if he makes a mistake or for some reason decides not to do it, then its not going to go onto the air; whatever the news department might have determined, it's just too bad. If he decides to press the wrong button or makes a mistake, that's wrong" (A. 291). So too, if the stagehand who pulls the curtain misses his cue, the show does not go on as scheduled. However that sort of control over the show would hardly qualify the stagehand as a supervisor (A. 319-320).

¹¹ It is well established that "theoretical or paper power will not suffice 'to make an individual a supervisor'". *Food Store Employees Union, Local 347, A.M.C. & B.W. v. N.L.R.B.*, 422 F.2d 685, 690 (C.A.D.C., 1969), quoting with approval from *N.L.R.B. v. Security Guard Service*, 384 F.2d 143, 149 (C.A. 5, 1967). Accord: *N.L.R.B. v.* (continued)

Thus, the producer-directors consistently testified that they lacked authority to discipline and that they had never been told by management that they had such authority (A. 67-68, 136, 161, 177). Indeed, the Company's program manager, who has overall responsibility for the work of both the producer-directors and the technicians, admitted that the producer-directors had no disciplinary authority (A. 296). Similarly there is no support for the Company's assertion that producer-directors customarily suspend technicians. Company Program Manager Salzman testified with respect to this situation that, except for emergencies, "we're dealing with a very hypothetical situation" and "this has not happened since I've been at the station" (A. 332-334). Moreover, none of the producer-directors testifying indicated that they were aware of or had authority to hire employees or to change a technicians job assignment (A. 67-68, 135-140, 161, 179-181).¹² Instead, the record is clear that it is the production manager, not

¹¹ (continued) *American Oil Co.*, 387 F.2d 786, 787-788 (C.A. 7, 1967), cert. denied, 391 U.S. 906; *Oil Chemical and Atomic Workers, Int'l. Union v. N.L.R.B.*, 445 F.2d 237, 243 (C.A. D.C. 1971).

¹² While the Company referred in its brief to the testimony of Program Manager Salzman allegedly showing that producer-directors may hire talent, research aids, and other persons, it neglected to mention that Salzman, when asked, gave only one example of when any producer-director, had done so (A. 350-351). Thus he testified that Susan Horowitz, the only producer-director who did not testify at the hearing, hired the "staff" on the Marsha Rose show, the Board, in reviewing the Regional Director's findings, plainly took this testimony into account, by providing that Horowitz could vote in the election subject to challenge by the Company (A. 21).

As discussed, *infra* p. ²³, this Court has specifically approved use of the Board's challenge procedure in identical circumstances as the proper method to preserve the rights of other employees similarly classified who clearly do not exhibit indicia of supervisory authority.

the producer-directors, who assigns production unit employees to particular programs (A. 61).

Likewise, producer-directors lack authority "effectively to recommend" disciplinary or other action under Section 2(11) of the Act (A. 6; 68, 127, 165, 169, 179). Here, only one of the four testifying producer-directors indicated that he had made regular reports to the Company about the performance of technicians (A. 6; 151, 165, 179). However, his repeated requests that a certain cameraman not be assigned to him went unheeded by his supervisors (A. 6; 68, 127). Although it appears that the Company has sought comments from producer-directors concerning probationary employees, these comments are only "one of many" opinions received by the Company and the record is clear that no technician or probationary employee has ever been disciplined or discharged solely based upon a producer-director's recommendation (A. 6; 346). Such reporting is plainly not the equivalent of an effective recommendation but merely amounts to "advising and awaiting decision from others." *N.L.R.B. v. Security Guard Service, Inc.*, 384 F.2d 143, 147 (C.A. 5, 1967); see, also *Post-Newsweek Stations*, 203 NLRB No. 91 (1973) 83 LRRM 1081; *Estel Mfg. Corp.*, 200 NLRB No. 84, slip op. p. 2, (1972). Compare, *Rowe Furniture Corp. of Missouri, Inc.*, 200 NLRB No. 84, slip. op. p. 2, (1972).¹³ "Trusted nonsupervisory employees are often looked to for . . . suggestions" of hirings, firings, and transfers without thus becoming supervisors. *Northern Virginia Steel Corp. v. N.L.R.B.*, 300 F.2d 168, 172 (C.A. 4, 1972.)

¹³ The situation here is thus far different from that presented in *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1177 (C.A. 2, 1969) where this Court found disputed watch and assistant air-conditioning engineers to be supervisors on a record which indicated that a favorable report from them was an essential prerequisite to a promotion or a merit increase.

As for the Company's assertion that the producer-directors have authority to assign overtime to technicians, a minor matter in any case, the record shows that the producer-directors must get prior approval of their supervisors before assigning overtime (A. 72, 151), and the Company program manager admitted that this was "not a regular thing" (A. 299). Only in the unusual situation where a program is running late, will the producer-director inform the technicians that they would have to work overtime. Such assignment of overtime in such a circumstance obviously is routine and clerical in nature and does not involve the independence of judgment indicative of supervisory status. *N.L.R.B. v. Cousins Associates*, 283 F.2d 242, 243 (C.A. 2, 1960); *N.L.R.B. v. Swift & Co.*, 240 F.2d 65, 67 (C.A. 9, 1957).

The Company cites (Br. 21-23) numerous Board cases in support of its assertion here that the producer-directors at KYW-TV function as supervisors. The vast majority of those cases, however, involve producer-directors or other similarly titled individuals who were either specifically empowered to make, or did in fact effectively recommend changes with respect to the employees working under them. The results reached in those cases therefore, are not inconsistent with the result reached here.¹⁴

¹⁴ See, e.g. *WCAU-TV, Inc.*, 93 NLRB 1003, 1004 (1951) (the directors rehearsed, cast, "assign(ed) work to the production men," and effectively recommended to the producer that employees working under their direction be transferred and discharged.); *Midwest Radio Television, Inc.*, 111 NLRB 337, 340 n. 3 (1955) (production directors had power to hire, discharge and direct the work of other employees); *El Mundo (WKAQ-TV Telemundo, Inc.)*, 127 NLRB 538, 540-541 (1960) (program on TV directors "can effectively recommend the hire or discharge of employees"); *WTAR Radio-TV*, 168 NLRB 976, 978 (1967) (television directors assigned work to members of his crew based on his evaluation of the capability of individuals they have made effective recommendations concerning the work performance of the crew, and have the power to release employees for lunch and break periods).

(continued)

Perhaps in recognition of the weakness of its position as to these indicia of supervisory authority, the Company argues strenuously that it is the existence, not the frequency of exercise of this authority, which is controlling (Br. 18). However, the non-exercise of this allegedly delegated authority suggests that such authority has never been delegated to the producer-directors. The Fourth Circuit recently responded to a similar assertion noting that while "it is not the exercise of authority but the delegation which is indicative of attributes of a supervisor, . . . we think it may fairly be added that an employee must be informed of such delegation of authority." *N.L.R.B. v. Southern Seating Co.*, 468 F.2d

14 (continued)

Moreover, the Company's assertion that producer-directors here exercise the same responsibility over public affairs programs that "news producers", found to have been supervisors, exercised over news programs, is unfounded. In both cited cases, *Westinghouse Broadcasting Co., Inc., (WJZ-TV, Baltimore)*, 195 NLRB 339 (1972) and *Westinghouse Broadcasting Co., Inc., (KPIX, San Francisco)*, 188 NLRB 157 (1971), the news producers were completely responsible for the content of the news programs. They decided what stories were to be used, as well as their sequence and timing, and reviewed the scripts prepared by the news reporters, and discussed program policy with higher management on a regular basis. At both stations the news producers assigned the news reporters the writing of necessary lead-ins and, in the absence of the assignment editor, assigned and reassigned news reporters and camera men as needed. In addition, the news producers at WJZ-TV, Baltimore, are responsible for the immediate day to day supervision of cameramen, reporters, film processors, and film editors, while at Station KPIX-TV, San Francisco, the news producer determines which newscaster will broadcast which story.

In contrast to the cases enumerated by the Company, the instant producer-directors have no authority to hire, fire, or otherwise effectuate personnel changes, and have little or no control over programming policy or content.

1345, 1347 (C.A. 4, 1972). See, *Food Store Employees Union, Local 347, A.M.C.&B.W. v. N.L.R.B.*, 422 F.2d 685, 689-690 (C.A.D.C., 1969). *N.L.R.B. v. Security Guard Service, Inc.*, 384 F.2d 143, 149 (C.A. 5, 1967).

**B. The Board Properly Found that the Producer-Directors
Were not Managerial Employees**

The Board also found that the producer-directors were not excluded as managerial employees from coverage under the Act and instead were employees who constituted an appropriate bargaining unit. In reaching this conclusion the Board's Regional Director found *inter alia* that the discretion and responsibility the Company vests in producer-directors related merely to their ability to effectuate established and well-defined policies established by their superiors (A. 7). The test used here for determining whether the producer-directors were managerial employees is clearly consistent with the Court's decision in *Bell Aerospace Company, Division of Textron, Inc. v. N.L.R.B.* 475 F.2d 485, 494 (1973) affirmed in pertinent part, ____ U.S. ____, 85 LRRM 2945 (1974) that Congress did not intend the exclusion of managerial employees to be limited to those in positions susceptible to conflicts of interest in labor relations, but rather that the exclusion embraced all managerial employees.¹⁵ We now show that the Board's determination that the producer-directors were not managerial employees should be affirmed as "within the reasonable

¹⁵ In this regard, the Supreme Court in *Bell Aerospace*, 85 LRRM at 2953 n. 19, cited with apparent approval the reasoning of *Eastern Camera and Photo Corp.*, 140 NLRB 569, 571 (1963) wherein it is stated that "the determination of an employee's managerial status depends upon the extent of his discretion, although even the authority to exercise considerable discretion does not render an employee managerial where his discretion must conform to the employer's established policy".

exercise of its discretion". *Continental Insurance Co. v. N.L.R.B.*, 409 F.2d 727, 730 (C.A. 2, 1969), cert. den., 396 U.S. 902.¹⁶

Contrary to the Company's contention, the instant producer-directors are without independent authority to formulate, determine, and effectuate management policies and therefore fail that traditional test of managerial employee status. The broad policy making authority ascribed to the producer-directors by the Company is simply contrary to the weight of the evidence. Thus, there is only scant record support for the Company's assertion (Br. 27) that the producer-directors have considerable voice in determining the form and content of the television programs produced by the Company. All the testifying producer-directors indicated that they had no voice at all in the Company's programming policy (A. 67, 137, 139, 162, 164, 179). Moreover, all the testifying producer-directors but one stated that they had no role in planning the format of the programs they produced (A. 95, 146-147, 165, 176). And that one producer testified that he had been consulted by the Company concerning the format of only one of the programs he has produced — namely Big Kid, Little Kid.

Furthermore, the producer-directors have little to do with the content of the programs they produce. As shown in the Counterstatement, producer-director Schmidt spends most of his time editing a film shot and scripted by the host-producer. Another producer-director, in his capacity as technical director for a public affairs program prepared at Hunter College, acts solely as liaison to insure the supply to Hunter College of the technical equipment needed to produce shows and has nothing to do with the content of the programs. Even Pyle, the producer-director of

¹⁶ However, the Regional Director's alternative holding that even if the producer-directors were managerial employees, they would still be entitled to representation absent some cogent reason to the contrary was based upon the Board's decision in *Bell Aerospace*, 190 NLRB 431 (1971) (A. 7) and has been rejected both by this Court and by the Supreme Court.

Big-Kid, Little-Kid, has little to do with the content of that show on a week-to-week basis. In a similar vein, the Company's assertion that the producer-directors determine the guests and topics for the talk shows they produce exaggerates their role to a considerable degree. The record shows that, while the producer-directors do engage in the preliminary screening of guests, they ordinarily submit both the guest list and topics to their superiors for approval (A. 146-147, 170-171, 185-187).¹⁷

The Company also contends that "it is perfectly clear" (Br. 26) that the producer-directors are allied with management by virtue of their labor relations functions. However, the Company's omission of any examples of the nature of these alleged labor relations duties suggests that its assertion is unsupported by the record. It should be noted that all testifying producer-directors indicated that they were not consulted at any time with respect to manpower or labor relations policies of the Company (A. 75, 137, 139, 162, 164, 178). And as shown *supra*, the Board found that the producer-directors were not supervisors within the meaning of the Act.

Also without merit is the Company's assertion that the producer-directors are managerial employees because they can commit the employer's credit in programs with above-the-line budgets. However, the current example pointed to by the Company — a program called the Martha Rose show produced by Susan Horowitz with an above-the-line budget of \$13,000 over normal operating costs — does not suffice to prove its case. And the indicia of managerial employee status must be possessed by the group as

¹⁷ As shown *supra*, the role of the producer-directors here is clearly distinguishable from that of the editorial writer found by the Tenth Circuit in *Wichita Eagle and Beacon Publishing Co. v. N.L.R.B.*, 480 F.2d 52 (1973) to be a managerial employee. There, the editorial writer at issue participated in "daily conferences" where she was called upon to "propose topics for editorials, propound her own viewpoint in an effort to influence policy on various subjects, and was, in sum, an integral participant in the newspapers subjective voice, its editorials (*Id.* at 55). In the instant case the producer-directors do not have a significant policymaking role.

a whole to have probative value. In resolving a similar case where some of the alleged supervisory employees appeared upon scrutiny to possess indicia of supervisory status, this Court in *International Ladies Garment Workers Union v. N.L.R.B.*, 399 F.2d 116 (1964) indicated that the proper course was for the Board to ascribe employee status to the alleged supervisors and give the parties the opportunity to challenge their ballots. The Court stated at 399 F.2d at 124 as follows:

. . . at the very most ILGWU could maintain that some business agents in some areas and cities have this supervisory authority over other ILGWU personnel. But we are dealing with business agents as a class, we are interested in only those duties all business agents have in common. If some business agents have supervisory functions . . . the proper procedure would have been ILGWU to challenge the votes of those particular agents on the supervisory grounds. . . Even if some business agents have supervisory functions, this does not mean that all business agents are deprived of the protection of the Act.

The Board's conduct here was wholly consonant with this Court's view. In denying the Company's request to review the Regional Directors determination that the producer-directors were entitled to employee status, the Board expressly stated that "the unit placement of Susan Horowitz can best be resolved through the challenge procedure" (A. 21).¹⁸

Moreover, this Court has also indicated that the fact that employees "pledge their employer's credit in limited amounts" is not determinative

¹⁸ The Company's further assertion that the Marsha Rose Show's predecessor was produced and directed by a producer-director with authority to commit the Company's credit in even greater amounts (Br. 28) does not avail the Company's position for the same reason that its assertion about Horowitz's authority to commit the Company's credit fails to advance the Company's position as to the managerial employee status of producer-directors as a group. As shown *supra*, the proper focus of inquiry is the authority of the category of employee as a group, not the authority of some particular individuals.

of managerial employees status. *International Ladies Garment Workers' Union v. N.L.R.B.*, *supra*, 399 F.2d at 129. Indeed recently on a record showing that employees extend credit up to \$5,000 at a time, without the concurrence of higher officials, and one extended over one million dollars worth of credit in 1-1/2 years, this Court in *Bell Aerospace Company Division of Textron v. N.L.R.B.*, *supra*, 475 F.2d 485, 486 n. 1, 494 (1973), affirmed, ____ U.S. ____, 85 LRRM 2945 (April 23, 1974) asserted that substantial evidence would have supported the Board's finding that the Company employer's buyers were not sufficiently high on the managerial hierarchy to constitute true managerial employees although the Court denied enforcement of the Board's order on other grounds.

In sum, the Board acted well within its discretion in determining that the instant producer-directors were not so involved in the formulation, determination, and selection of management's policy as to warrant their exclusion from the Act's protection as managerial employees.

CONCLUSION

For the reasons stated above, it is respectfully requested that a judgment be entered denying the Company's petition for review and granting the Board's cross-application for enforcement in full.

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Washington, D.C. 20570

September, 1974

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

WESTINGHOUSE BROADCASTING)	
COMPANY, INC., KYW-TV)	
)	
Petitioner,)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	No. 74-1319
Respondent,)	No. 74-1319
)	
and)	
)	
DIRECTORS GUILD OF AMERICA, INC.,)	
)	
Intervenor.)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

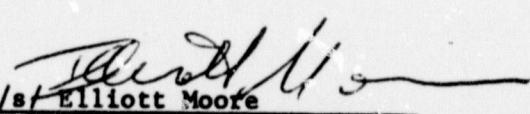
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Dated at Washington, D. C.

this 3th day of September, 1974